

— IN THE —  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
— FOR THE —  
NINTH CIRCUIT.

October Term, A. D. 1892.

WALTER HINCHMAN,

*Appellant.*

vs.

GEORGE O. KELLY AND ANDREW  
C. SMITH, Executors of and  
Trustees under the last Will  
and Testament of EDWARD S.  
SMITH, deceased, and MARY A.  
SMITH and the NORTH OLYM-  
PIA LAND COMPANY,

*Appellees.*

BRIEF OF RESPONDENTS,

GEORGE O. KELLY AND ANDREW C. SMITH.

PARSONS & CORELL,

*Solicitors for Respondents.*

FILED  
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So far as these respondents are concerned, the material allegations of the bill are:

January 1st, 1872, an agreement between Ira B. Thomas and E. S. Smith, describes certain lands and

agrees to sell to Smith an undivided one-fifth interest in all that may remain unsold to other parties on January 1st, 1874, and to divide proceeds of sales.

That no sales were made. That Thomas acted as trustee of one Philo Osgood, and that Smith was the agent of a Maine corporation by the name of the Lake Superior & Puget Sound Company, that this Company advanced the money paid upon the contract, thirty-six hundred dollars (\$3,600.00).

Thomas died in New York October 9th, 1872; Smith in California, December 31st, 1885.

Plaintiff claims title to the land by conveyances as follows:

January 3<sup>rd</sup>, 1891, L. S. & P. S. Co. to Whidby Land & D. Co.

November 20th, 1891, W. L. & D. Co. to plaintiff.

He claims to be the owner of the contract by assignments of the same dates. The record does not show when this suit was commenced. The amended bill now here appears by the clerk's marks to have been filed March 3<sup>rd</sup>, 1892.

In support of the ruling of the court sustaining the demurrer of these respondents, we submit:

First. That where an agent purchases with the money of his principal, taking title in his own name but without the previous knowledge of the principal, it is at the election of the principal, upon the discovery of the facts, to declare the title held by the agent in trust, or to recover the money in an action for an accounting; that the first is personal to the principal and not the subject of assignment.

Second. That the deed of the L. S. & P. S. Co. passed no interest to the land in question. If a trust resulted

in its favor, it was a foreign corporation, and it does not appear by the facts stated in the bill that it could hold real estate in the Territory of Washington or enforce a specific performance of a contract to convey or to declare a resulting trust. If it could not take the legal title, it could not hold as a *cestui que trust*, besides a *cestui que trust* cannot convey the legal title.

Third. That the cause of action against the decedent Smith, if any, whether to enforce a trust or to collect the money, was barred by the statutes of limitation.

Fourth. If not barred by the statutes of limitation, the claim was stale, speculative and without merit, and as such, a court of equity would not lend its aid to a mere buyer in.

I understand the rule to be that one seeking a specific performance of a contract, especially if in parol, must be diligent; in the language of some of the cases, "ready, prompt and eager." In this case Smith lived more than thirteen years after the making of the agreement set out. The executors of Smith have at no time admitted plaintiff's claim, the statute has run since their appointment.

The statute bar under the laws of Washington was three years. Plaintiff's alleged purchase of the property was nineteen years after the making of this contract, six years after the death of Smith, and no claim appears to have been made at any time by the alleged *cestui que trust*, its grantor. As a strict bar the cases are numerous to the effect that when an action at law upon the contract would be barred an action for specific performance will also be barred.

It is alleged that complainant's grantor demanded of these respondents a conveyance of the land or an assignment of the contract. It is not alleged when this demand was made. If not made within a year after the first publication by them of notice to creditors it is barred by Section 1467 of the Code of Washington. If more than three months before the commencement of this action, it is barred by Section 1472. Section 1473 forbids the allowance of any claim which is barred by the statute of limitations. And Section 1474 provides that no action can be maintained upon any claim unless first presented to the executor. As it is not alleged that there was any express agreement between the Puget Sound Company and Smith for the investment of the money, a trust would arise only at the option of the principal, until which time the claim would remain a mere money demand and as such would come within these provisions of the statute.

Brown vs. County of Buena Vista, 95 U. S., 157.

Wood vs. Carpenter, 101 Id., 135.

Perry on Trusts, S. 865.

Fifth. The bill is multifarious. First, it seeks to establish a trust by parol as against the representatives of Smith. Second, it alleges that Thomas was the trustee of Osgood, but whether the trust was express or implied or how created, is not alleged. It seeks to avoid a conveyance by those succeeding to that trust. Third, it asks to have the conveyance by Thomas' administratrix declared void.

GALUSHA PARSONS,

For Respondents Smith and Kelly.